

**OPINION
72-322**

February 9, 1972 (OPINION)

Mr. Walter R. Fiedler
Director of Institutions

RE: State - Grafton State School Patient Records - Confidentiality

This is in reply to your letter received by this office dated January 31, 1972, with regard to confidentiality of patient records maintained by the Grafton State School.

You indicate that the records involved are those contained in a "clinical" file would indicate that same contains various medical, psychological, sociological, educational, familial and individual information about the specific patient concerned, and that the "correspondence" file contains all correspondence concerning the individual from parents, relatives, friends and other agencies.

You ask that we review and advise if any of the documents are statutorily confidential or only confidential from a standpoint of professional ethics.

We feel that a brief review of some of the applicable statutes might best serve to clarify the total picture here concerned.

To first look at the broad general background as you are undoubtedly aware section 25-04-13 of the North Dakota Century Code for does provide that the superintendent of the Grafton State School shall be the guardian of the person of any resident of the Grafton State School who does not otherwise have a guardian of his person duly appointed by a court of competent jurisdiction, or whose parents do not elect to retain their natural guardianship of the person as therein provided. While the statutes do not in great detail specify the term of that "guardianship", generally speaking a guardianship does necessarily imply a confidential relationship. (See: 39 Am. Jur.2d. 159-166, Guardian and Ward, sections 208-217, and the provision of section 30-14-02 of the North Dakota Century Code, that "The relation of guardian and ward is confidential and is subject to the provisions contained in title 59, Trusts, Uses and Powers.")

On the other hand, of course, the Grafton State School is a governmental institution. In this respect we should probably consider the provisions of section 44-04-18 and 54-23-08 of the North Dakota Century Code as follows:

44-04-18. ACCESS TO PUBLIC RECORDS. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organization or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable hours."

54-23-08. BOARDS TO HAVE ACCESS TO INSTITUTIONS AND TO BOOKS AND RECORDS OF INSTITUTIONS. The board shall have access to all the state institutions under its management and control, and to all books, accounts, vouchers, supplies, and equipment of each of the institutions so that each member of the board may familiarize himself with the conditions, needs, and requirements of the institutions. All books, documents, and records relating to the concerns and business of such institutions at all times shall be open to the examination of any citizen of this state." (emphasis ours)

Again in this respect we should consider, though some relates to records of the director of institutions of persons in these institutions, the provision of the last sentence of section 54-23-19 of the North Dakota Century Code that:

No one but a member, the secretary, or a proper clerk of the board shall have access to the record except by the consent of the board, or on the order of a court of record."

As your letter implies, of course, some of these records are made by professional or official personnel as a part of their professional services at the behest, of course, of the state but for the treatment and care of the person. In this respect we might note the last two subsections of section 31-01-06 of the North Dakota Century Code, as amended, as follows:

ATTORNEYS, CLERGYMEN, PRIESTS, PHYSICIANS, SURGEONS AND PUBLIC OFFICERS CANNOT TESTIFY REGARDING CONFIDENTIAL COMMUNICATIONS. A person cannot be examined as a witness in the following cases:

* * *

3. A physician or surgeon, without the consent of his patient, cannot be examined as to any information acquired in attending the patient or as to any communications made by the patient to him in the course of professional employment.
4. A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure."

Lastly, considering the scope and function of the Grafton State School we believe some consideration must be given to section 25-16-07 of the North Dakota Century Code providing that:

RECORDS OF TREATMENT OR CARE CENTER CONFIDENTIAL. No agent of the department of health or the superintendent of the Grafton state school or the licensee or their agents or employees shall disclose the contents of the individual records of a treatment or care center for mentally retarded, nor of the reports received therefrom, except:

1. In a judicial proceeding when ordered by the presiding judge; or

2. To officers of the law or any other legally constituted boards or agencies serving the interests of the residents;
or
3. To the parents or legal guardians of the resident."

While general statutes do not necessarily apply to the sovereign except when it is specifically mentioned therein, and for this reason, while the state of North Dakota is a charitable, nonprofit corporation or association among other things, we are not holding that the provisions of section 25-16-01 of the North Dakota Century Code would necessarily apply to the Grafton State School itself as well as other institutions with which it might deal particularly as the superintendent of the Grafton State School, agents and employees are specifically mentioned therein.

We, of course, have not examined specific examples of the items mentioned in the list of "contents of clinical file" and list of "contents of correspondence file" included with your letter. From the titles used therein they would largely appear to be individual records relating to treatment, care, custody and control of individual resident's aspects of the institutional operation, we would assume that same would be open to the examination of any citizen of the state and in the words of section 44-04-18, quoted above, public record.

HELGI JOHANNESON

Attorney General